83-184

NO. 82-

Office-Supreme Court, U.S.
FILED
JUL 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term,

1982

IN RE WILLIAM WHITLEY HODGES, Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1. Whether a state, consistent with the First and Fourteenth Amendments, may discipline an attorney for misleading advertising who offered to enroll persons in wage earners' plans because the ad did not explain every contingency under Chapter 13 of the Bankruptcy Reform Act of 1978, but where the ad (a) was not shown to have misled anyone, (b) advertised services available and wholly performable under the Act, (c) contained a disclaimer that an appointment and evaluation were necessary to determine whether a person qualified for the services advertised and (d) followed the American Bar Association guidelines for advertising?

2. Whether a state, consistent with the Due Process Clause of the Fourteenth Amendment, may discipline an attorney on

the grounds that an advertisement was misleading in practice where no such charge was ever made in the complaint or at the disciplinary hearing, where evidence that the ad was not misleading in practice was excluded on grounds of irrelevancy and where the record is totally devoid of any evidence of the offense?

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OPINIONS BELOW

The opinion of the Supreme Court of South Carolina sought to be reviewed is unreported and is appended hereto at 1a.

The recommendation of the Executive Committee of the Board of Commissioners on Grievances and Discipline is unreported and is appended hereto at 8a.

The recommendation of the Hearing Panel of the Board of Commissioners on Grievances and Discipline is unreported and is appended hereto at 14a.

JURISDICTION OF THE COURT

The opinion of the Supreme Court of South Carolina sought to be reviewed was entered on May 4, 1983. Jurisdiction to review the opinion below is conferred on

this Court by 28 U.S.C. §1257(3).

STATUTES INVOLVED

Disciplinary Rule 2-101(A) of the Code of Professional Responsibility of South Carolina provides in relevant part:

> (A) A lawyer shall not, on behalf of himeself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
>
> (1) Without limitation a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim includes a statement which:
>
> (a) Contains a material misrepresentation of fact;
>
> (b) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
>
> (c) Is intended or is likely to create an unjustified expectation; ....
>
> (f) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or

disclaimers necessary to make a representation or implication not deceptive; ....

(2) A lawyer shall not, on behalf of himself, his partner or associate, or any lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which: ....
(d) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public; ....
(f) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles, or garish or sensational language or format.

STATEMENT OF THE CASE

Petitioner William Whitley Hodges is a member of the Bar of South Carolina.[1]

1. Petitioner was admitted to practice in 1973. He has been active in the State Bar and has served as Chairman
FOOTNOTE CONTINUED NEXT PAGE...

Beginning in the early summer of 1981, he placed the following advertisement in several newspapers of general circulation in the Columbia, South Carolina area:

Our GET OUT OF DEBT Service

IF YOU ARE BEING HARASSED BY YOUR CREDITORS AND YOU NEED HELP TO GET OUT OF DEBT:

oSTOP CREDITOR'S HARASSING CALLS

oSTOP FORECLOSURE OF HOME OR PROPERTY

oSTOP INTEREST/FINANCE CHARGES FROM BUILDING UP

IF YOU ARE EMPLOYED AND NEED HELP TO GET OUT OF DEBT, OUR LAW FIRM CAN HELP YOU BY ENROLLING YOU IN A WAGE-EARNERS PLAN. CALL WILLIAM HODGES FOR AN EVALUATION OF YOUR PROBLEM AND AN APPOINTMENT.

FOOTNOTE CONT'd...of its Public Information Sub-Committee. 5a. Prior to the action in this case, he had never been professionally disciplined in any way.

799-9985 weekdays 787-4828 weekends

THE WILLIAM HODGES LAW FIRM
1338 MAIN AT WASHINGTON
Save this ad for future reference

In December, 1981, the Board of Commissioners on Grievances and Discipline of the South Carolina Bar (hereinafter "Board of Commissioners") served a Complaint upon Petitioner charging that his advertisement was "conduct constituting improper advertising and solicitation."[2]

The attorney general of South Carolina, who prosecuted the Complaint, stipulated that Petitioner was charged with violating: Disciplinary Rules 1-102 (A)(4,5 and 6);[3] 2-101(A)(1)(a,b,c and f),

2. The Complaint was issued by the Board of Commissioners after a copy of the ad was forwarded to it by the Supreme Court of South Carolina. Letter from Donald V. Richardson, Chairman, to Laughlin McDonald, received May 19, 1982.

3. DR 1-102(A)(4,5 and 6) provide:
FOOTNOTE CONTINUED ON NEXT PAGE

supra, at 2-3; 2-101(A)(2)(d and f), supra, at 3a; and Rule 5(B and D) of the Rule on Disciplinary Procedure.[4] See Minutes of hearing on April 9, 1982, at 3, attached to the Transcript of the hearing on the merits before the Hearing Panel of the Board of Commissioners on September

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FOOTNOTE CONT...(A) A lawyer shall not:... (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

4. Rule 5(B and D) provide: Misconduct as the term is used herein means any one or more of the following:.... B. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's Oath of Office or the Code of Professional Responsibility as is in effect and adopted by the Court, whether or not the act or omission occurred in the course of an attorney-client relationship. ... D. Conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating unfitness to practice law.

23, 1982 (hereinafter "T"), and T. 43.[5]

Petitioner designed the ad himself, following the guidelines on advertising contained in the pamphlet "Bar Association Advertising: A How to Manual," published by the Commission on Advertising of the American Bar Association. T., Respondent's Exhibit No. 2. According to the manual, a newspaper ad will normally utilize a headline to "catch the reader's eye and attention and, it is hoped, induce him or her to read the copy." Id., at 12. The manual advises that the copy in a newspaper ad "generally should be as brief as possible" and "focus on one

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5. The Attorney General also indicated that DR 2-101(B) and DR 2-103, dealing with solicitation, were alleged as having been violated. However, the State later abandoned any direct reliance upon these latter two rules. T.30.

thing or subject." Id. Material should be presented so that it comes across "as interestingly and directly as possible." Id., at 7. Utilizing these standards, Petitioner designed a brief headline, a statement of the services offered, a disclaimer warning that an evaluation was required to determine whether or not persons qualified for the services, and an inquiry clause listing his telephone number. The ad was geared to a lay audience in need of financial counseling and assistance, and was therefore written in simple, direct lay language.

Upon receipt of the Complaint, Petitioner promptly terminated the ad and has not used it since. T. 124. He later filed an Application to Authorize Publication of Advertisement with the Supreme Court of South Carolina "to show my good faith and to do what is right." T. 149.

The application was denied on September 24, 1982.

The gravamen of the Complaint was that Petitioner's advertisement was facially misleading. The State never contended that any one had in fact been mislead, nor did it call a single witness. The state's evidence was limited solely to the advertisement itself. See Minutes of hearing on April 9, 1982, p. 3; T. 43, 104 ("We have not made any charges about neglect or mishandling of any cases... we are talking about the ad on its face, its face value."), 146-47. Indeed, when Petitioner tried to introduce evidence that no one had been misled by the ad the State objected and the Hearing Panel sustained the objection on the grounds of irrelevancy. T. 28-9, 121, 103-05, 121.

Petitioner presented the testimony of two experts in bankruptcy law to the Hearing

Panel: a former United States Bankruptcy Judge for the Northern District of Georgia; and a law professor of the University of South Carolina who taught commercial law courses and advised a student bankruptcy clinic. Petitioner also cross examined the Standing Chapter 13 Trustee for the District of South Carolina who was called as an expert by the Hearing Panel. The expert witnesses' testimony was uncontradicted that the ad advertised services available and wholly performable under Chapter 13 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §1301 et seq., T.21-2, 97-8; Deposition of Ezra H. Cohen, p. 6, and that based upon the total context of the ad it was neither false nor misleading. T.97-8; Deposition of Ezra H. Cohen, p. 7,9: ("calling for an evaluation [and appointment] does indicate that there is a need for further scrutiny as to exactly what relief is available and

whether this person would fit the criteria for Chapter XIII.") The experts also agreed that it would be impossible to explain all the contingencies of Chapter 13 proceedings in a typical newspaper ad. T.20-1, 83; Deposition of Ezra H. Cohen, p. 8.

Petitioner testified concerning his creation and use of the ad and the manner in which he counseled individuals responding to it. He personally screened all respondents by telephone. If he felt they could "get a return on their investment as far as helping them...rehabilitate their credit," T. 126, he set up an appointment at which he explained in detail the nature of Chapter 13 and reviewed the specifics of each individual case. T. 130. He explained the procedures under the Act for stopping foreclosures, T. 134-35, the treatment of

secured and unsecured debt under Chapter 13, T. 135-36, the manner in which harassing calls from creditors could be stopped, T. 136-37, and how Chapter 13 stops interest and finance charges from building up. T. 137.

Petitioner also furnished each of his clients a four page memorandum further explaining Chapter 13: e.g. the requirements for qualifying as a debtor; the favorable aspects of Chapter 13 ("you pay-off your debts rather than discharging them...", etc.); detriments under Chapter 13; fees and costs; the adverse impact of Chapter 13 upon credit rating; treatment of harassing calls by creditors; the general requirement of good faith in paying debts; required appearance in court; treatment of a business under Chapter 13; voluntary dismissal; treatment of cosignors; role of client's attorney; and, treatment of legal papers served on

the client. T., Respondent's Exhibit No.1.

Petitioner charged no fee of any kind for interviews or consultation. T. 128. If a client was turned away because of the low level of unsecured debt, or for any other reason, there was no charge whatsoever. Id.

The Chapter 13 Trustee, who has 1400 active cases and has observed attorneys from throughout the State, testified that Petitioner's clients were on the average better informed than those of other attorneys, and he had never known any to have been misled. T. 32-3. The Trustee had such confidence in Petitioner, in fact, that he referred clients to him. T. 34.

The Public's Need To Know

Petitioner also produced uncontradicted evidence of the critical need in the consuming public of South Carolina for information about wage earners'

plans. According to a Professor of the College of Business Administration, University of South Carolina, and the Associate Director of its Division of Research, unemployment in South Carolina was the highest "ever experienced...for as long as we have been keeping records," T. 50,--11.9% (as opposed to 9.8% nationwide). Moreover, the average length of unemployment was 12 weeks, a period of time "perhaps twice as long as the accummulated savings of the typical family in South Carolina can withstand." T. 54. The State, not surprisingly, has the highest rate of mortgage defaults in its history, T. 54, and nationwide is second only to Michigan. Even those who are working at jobs in manufacturing "are almost getting down toward being part time." T. 55. In sum, "we have more people who are in financial dire straits than ever before

in our recorded history," T. 56, and there is "a definite and decided need" in the State for information about debt rehabilitation and consumer financial assistance. Id.

Those most in need of such information, however -- the out of work and the relatively uneducated -- are those most ignorant of the existence and benefits of Chapter 13 debt rehabilitation plans. About 75% of the population, "particularly in this lower scale group, lower socio-economic income group" experiencing record levels and duration of unemployment, are unaware that Chapter 13 exists. T. 61. Ironically, those least in need of Chapter 13 -- "the upscale people" in the business community who regularly deal with lawyers and accountants -- are those most knowledgeable of its existence. Id.

State and federal policy are "very protective of the individual consumers," T. 77, and "there is a common goal that [state and federal] legislative bodies have sought to accomplish." T. 78.[6] The information in Petitioner's ad, according to the expert testimony, was not merely "consistent with federal and state [bankruptcy] policies," but "in fact, promote[d]" those policies. T. 82.

The organized bar, in South Carolina is "reluctant" to represent debtors primarily because such practice doesn't pay

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6. Chapter 13 was enacted in 1978, in response to the enormous growth in consumer credit after World War II, to give individuals the opportunity under court supervision to develop and perform under plans for the repayment of debt over an extended period. The plans either call for full repayment or offer creditors a percentage of their claims in full settlement. The underlying purpose of Chapter 13 is to rehabilitate the debtor and give him or her a fresh start. House Rep. No. 95-595, 5 U.S. Cong. & Admin. News 1978, pp. 6076-79; T. 74.

well. T. 84-5. Public service organizations, such as legal aid and student clinics operated by the University of South Carolina, do not meet the needs of debtor consumers. According to a law professor at the University of South Carolina, "[e]ven if Legal Aid did nothing but bankruptcy and even if we ran our clinic with the nine students enrolled in it now, we certainly could not meet the need for representation for consumer debtors." T. 81.

In order for an attorney to practice debtor law, procedures must be systematic and a certain level of cases maintained: "debtor representation, requires a system in order to do it at all properly. You have to handle a fair number of cases to develop some particularized expertise because the clientele that you are dealing with are incapable of paying attorney's

fees which would compensate the average attorney for his hourly wage if he took one case a month or something like that." T. 84. In order to maintain a minimum case level, and because the Bar itself has defaulted in its duty to inform the public of the existence and availability of legal services, see T. 25 ("the Bar itself as an entity has [not] undertaken any public education campaign about bankruptcy and Chapter XIII"), and Canon 2 of the Code of Professional responsibility, lawyers must advertise privately to inform the public of the existence of debtor services and the lawyers' willingness to perform them.

Petitioner's debtor law practice has been virtually closed down by the ban on his advertisement. T. 143.[7]

7. Ironically, the ban on Petitioner's ad came at a time when the Credit Bureau, Inc. advertised in a local newspaper that FOOTNOTE CONTINUED ON NEXT PAGE....

The Decision Below

Following a hearing on September 23, 1982, the Hearing Panel concluded generally that Petitioner's advertisement was misleading in practice; was inherently false and misleading; was not entitled to the protection of the First Amendment and could be prohibited; and, was in contravention of the Disciplinary Rules of the Supreme Court of South Carolina. 53a-4a.[8]

FOOTNOTE CONTINUED...debtors should not consult their lawyers. T., Respondent's Exhibit No. 3.

8. There were no findings that any specific Disciplinary Rules were violated, although the language of the report tracks the language of DR 2-101(A)(1)(b)("This advertisement...omits to state material facts necessary to make the statements, in light of all circumstances, not misleading."); (c) ("It is also likely to create unjustified expectations as to the ultimate results of a wage-earner's plan."); and (f)("It fails to contain reasonable warnings or disclaimers necessary to make the representation not deceptive to an ordinary prudent person."); and DR 2-101(A)(2)(d) ("By guaranteeing results, the advertisement contains a representation or implication regarding the quality of legal service which is not susceptible of reasonable verification by the public."). Id.

According to the Hearing Panel, the ad was misleading because it failed to explain all the contingencies under Chapter 13: "not everyone qualifies for relief under a wage earner's plan", "[t]here are also restrictions concerning individuals who have previously been discharged in bankruptcy within six (6) years from the filing of a new petition", "a wage-earner's plan may not modify the terms or rights of a claim secured only by a security interest in real property that is the debtor's principle residence", "[t]he collection of alimony, maintenance, or support from property that is not property of the estate will not be stayed by a petition in bankruptcy", etc.; and, there was "the possibility of individuals in the public failing to obtain an explanation [of these contingencies] and therefore laboring under misconceptions." 33a-6a; 42a.

The Hearing Panel recommended a public reprimand. 60a.[9] The Executive Committee, upon its review of the record, voted 5 to 0 to adopt the Hearing Panel's findings of fact and conclusions of law, but by a vote of 3 to 2, it voted to reduce the sanction to a private reprimand. Two members of the Executive Committee voted for no sanction at all to be imposed. 13a.

The Supreme Court of South Carolina, in a brief per curiam opinion, held that "the advertisements are misleading and violate DR 2-101," and publically reprimanded Petitioner. 2a. Two of the five Justices dissented. They noted that, according to the expert testimony the ad was neither false nor misleading;

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9. The Panel did not attempt to disguise its antipathy to lawyer advertising: "This Panel...is personally convinced that attorney advertising still constitutes improper etiquette...[and] view[s] commercial legal speech with disapprobation." 57a-8a.

that Petitioner had followed the American Bar Association guidelines in designing the ad; that the ad contained a disclaimer that an evaluation was required to determine whether or not persons qualified for the services; and that, given the ad's audience, it was necessarily written in simple, direct layman's language. The dissenters concluded that the majority opinion did not, consistent with the First and Fourteenth Amendments, regulate commercial speech "with care and in a manner no more extensive than reasonably necessary to further [the state's]... substantial interests." 7a. The dissenters would have dismissed the complaint.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA DISCIPLINING PETITIONER FOR MISLEADING ADVERTISING DEPRIVED HIM OF CONSTITUTIONALLY PROTECTED FIRST

AMENDMENT RIGHTS AND PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. An Advertisement of Attorney Services Is not Constitutionally Required to Explain Every Possible Contingency Involved.

Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977), and Matter of R.M.J., 455 U.S. 191 (1982), make clear that attorney advertising is commercial speech entitled to First Amendment protection. It may be regulated only where a particular ad "is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." Matter of R.M.J., supra, 455 U.S. at 202. The state court found the ad here to be misleading because it advertised wage-earners' plans but did not explain all

the possible contingencies under Chapter 13 of the Bankruptcy Reform Act of 1978. But an ad, by definition, cannot do what the lower court held it failed to do. Common sense, the American Bar Association guidelines on advertising, and the decisions of this Court do not require that an advertisement be a legal treatise and explain in detail all the nuances and contingencies involved in the services offered.[10]

In Bates v. State Bar of Arizona, supra, the Court rejected the argument that attorney advertising could be banned

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10. As the former bankruptcy judge who testified before the Hearing Panel observed: "Obviously an advertisement, if there is to be an advertisement, has to condense the law and presumably hit the major points of the law. And I think this ad does hit the major points of the law. And as far as it goes, it appears to be on target." Deposition of Ezra H. Cohen, at 8.

simply because its information was incomplete. The Court reasoned that the public is sophisticated enought to realize the limitations of advertising, and is better served by having correct but incomplete information than having no information at all. "[W]e view as dubious any justification [for an advertising ban] that is based on the benefits of public ignorance." 433 U.S. at 375. Moreover, if the public is unsophisticated the bar has a duty to educate it rather than keeping it in ignorance by banning attorney advertising altogether. Id. The approach taken by the court below, however, would effectively eliminate the advertising Bates held protected.

Petitioner's ad advertised services undeniably available and performable under Chapter 13. It did not guarantee results or state that they were auto-

matic. It expressly provided that an appointment and evaluation of each person's problem was necessary. The experts who testified were unanimous that the ad was not false or misleading merely because it did not explain all the contingencies involved in Chapter 13 proceedings.

B. The State Court Applied the Wrong Legal Standard in Determining that the Ad Was Misleading.

The lower court concluded that Petitioner's ad was misleading because there was "the possibility of individuals in the public" being misled. 4a. The proper standard for regulation of commercial speech, however, is whether a particular ad "is inherently likely to deceive," Matter of R.M.J., supra, 455 U.S. at 202, not whether under any conceivable set of circumstances it is possible that a member of the public might be misled.

Bates v. State Bar of Arizona, supra, 433 U.S. at 373 n. 28, in the analogous context of price advertising, rejected the argument that the possibility of confusion was enough to justify a ban on the ad in question.

> We recognize that an occasional client might fail to appreciate the complexity of his legal problem and will visit an attorney in the mistaken belief that his difficulty can be handled at the advertised price.... In light of the benefits of advertising to those whose problem can be resolved at the advertised price, suppression is not warranted on account of the occasional client who misperceives his legal difficulties.

The standard applied by the state court in this case including the bare "possibility" of misleading has little to do with the real world of the consuming public and amounts to a virtual ban of the advertising of services by attorneys.

C. Petitioner's Screening and Follow Up Procedures Insured that even the

Hypothetical Misunderstanding Client Was Promptly and Fully Informed.

In Bates v. State Bar of Arizona, supra, this Court indicated that even if an occasional reader of an ad were misled, that would not be sufficient to justify a ban where the misunderstanding could be cleared up at the initial consultation with the attorney. "The misunderstanding, however, usually will be exposed at the initial consultation.... In light of the benefits of advertising to those whose problems can be resolved...suppression is not warranted on account of the occasional client who misperceives his legal difficulties." 433 U.S. at 373 n. 28. The screening procedures adopted by Petitioner (which were without cost to the prospective client) and his office follow up insured that even the hypothetical misunderstanding client -- and there were none --

would be promptly and fully informed.[11]

D. The Ban on Petitioner's Advertising Is Unconstitutionally Broad.

Because of the importance of advertising to the consuming public the states may not ban certain types of even misleading advertising "if the information also may be presented in a way that is not deceptive." Matter of R.M.J., supra, 455 U.S. at 203. The preferred remedy in such cases is not prohibition but further explanation, see Bates v. State Bar of Arizona, supra, 433 U.S. at 375 ("Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate

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11. A fellow member of the bar described Petitioner's office follow up procedures as constituting "a very high level of care for clients" by prevailing standards. T. 106.

picture, the preferred remedy is more disclosure, rather than less."), or the requirement of disclaimers. Matter of R.M.J., supra, 455 U.S. at 203. The regulation of commercial speech "must be narrowly drawn, and the state may regulate only to the extent regulation furthers the state's substantial interest." Id., 455 U.S. at 203; Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

The absolute ban on Petitioner's ad does not begin to meet constitutional standards. It ignores the fact that the ad contained disclaimers advising that an appointment and evaluation were necessary in each case. The state did not require more disclosure; it imposed silence. The ban on Petitioner's ad is not narrowly drawn; it is a total prohibition.

The state court's decision demonstrably undercuts both state and federal

policy by withholding from South Carolina consumers critically needed information about debt rehabilitation and dries up the insufficient, limited pool of attorneys willing to represent small debtors. The State's advertising ban in this case is simply inconsistent with the First Amendment and the controlling decisions of this Court.

II. PETITIONER WAS DISCIPLINED FOR AN OFFENSE WITH WHICH HE WAS NEVER CHARGED OR TRIED, AND UPON A RECORD TOTALLY DEVOID OF EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE APPLICABLE DECISIONS OF THIS COURT.

The State repeatedly disavowed that it was charging that Petitioner's ad was misleading in fact, and introduced no evidence on the issue whatsoever. The Hearing Panel explicitly ruled at trial

that whether the ad was misleading in practice was not an issue, and even refused to allow Petitioner to introduce evidence showing that no one had been misled. Despite this, the Hearing Panel concluded in its report that "there is sufficient evidence in this record to establish that the Respondent's particular advertisement is misleading in practice." 54a. The Hearing Panel's findings of misconduct were concurred in by the Executive Committee and adopted by the Supreme Court. 1a-2a. The action of the state court is highly irregular and violates the Due Process Clause of the Fourteenth Amendment and the applicable decisions of this Court.

It is an elemental requisite of due process that no sanction may be implemented upon a record devoid of evidence of an offense, Thompson v. Louisville,

362 U.S. 199, 206 (1960) ("it [is] a violation of due process to convict and punish a man without evidence of his guilt."), or on a record upon which no rational trier of fact could have found an offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). The restraints of due process are, of course, fully applicable to state bar disciplinary proceedings. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 n.5 (1957) ("it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the state's grace."); Konigsberg v. State Bar, 353 U.S. 252 (1957); In re Primus, 436 U.S. 412 (1978). It was a clear denial of due process for the court

below to conclude upon a record devoid of any evidence that Petitioner committed the disciplinary offense of in fact misleading members of the public by publication of his ad. And certainly, "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, supra, 443 U.S. at 324.

Not only was there no evidence of Petitioner's asserted misconduct, but he was found guilty and disciplined for an offense with which he was not even charged. The record shows beyond all doubt that the state charged Petitioner with publishing an ad that was intrinsically misleading, not one that was misleading in practice or in fact. Yet the state court found Petitioner guilty of the latter offense. This Court has held

on numerous occasions that conviction upon a charge not made "would be sheer denial of due process." De Jonge v. State of Oregon, 299 U.S. 353, 362 (1937); Thompson v. Louisville, supra, 362 U.S. at 206; Cole v. State of Arkansas, 333 U.S. 196, 201 (1948)("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.") The decision below that Petitioner was guilty of an offense with which he was never charged denied him due process and should be set aside.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari, and summarily reverse the opinion and judgment below or set the case

for argument.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

Opinion No. 21916
Filed May 4, 1983

PUBLIC REPRIMAND

Attorney General T. Travis Medlock and Assistant Attorney General C. Havird Jones, Jr., both of Columbia, for complainant.

Herbert Buhl, III, of Columbia; and Laughlin McDonald, of Atlanta, Georgia, for respondent.

PER CURIAM: The Hearing Panel of the Board of Commissioners on Grievances and Discipline recommend respondent William Whitley Hodges be publicly reprimanded for professional misconduct. The

Executive Committee concurs in the Panel's findings of misconduct, but recommends a private reprimand. We agree with the Panel the appropriate sanction is public reprimand.

The misconduct arises from advertisements published by respondent in The State newspaper. The advertisements are remarkably similar to the ones we recently disapproved in In The Matter of Harvey William Burgess, Op. No. 21890, Smith's 4/2/83.

We find the advertisements are misleading and violate DR2-101. Accordingly, respondent William Whitley Hodges stands publicly reprimanded.

s/J. Woodrow Lewis C.J.

s/Bruce Littlejohn A.J.

s/J. B. Ness A.J.

George T. Gregory, Jr., and David W. Harwell, JJ., dissent.

HARWELL, A. J. (dissenting): The Board of Commissioners on Grievances and Discipline initiated this Complaint in response to a newspaper advertisement. It served respondent with a Notice and Complaint in December 1981. The Complaint alleged that the respondent committed misconduct by having published in the The State Newspaper an advertisement which was false, misleading, self-laudatory and which constituted solicitation. Attached to the Complaint was a copy of the advertisement:

Our GET OUT OF DEBT Service

IF YOU ARE BEING HARASSED BY YOUR CREDITORS AND YOU NEED HELP TO GET OUT OF DEBT:

- STOP CREDITOR'S HARASSING CALLS
- STOP FORECLOSURE OF HOME OR PROPERTY
- STOP INTEREST/FINANCE CHARGES FROM BUILDING UP

IF YOU ARE EMPLOYED AND NEED HELP TO GET OUT OF DEBT, OUR LAW FIRM CAN HELP YOU BY ENROLLING YOU IN A WAGE EARNERS PLAN CALL WILLIAM HODGES FOR AN EVALUATION OF YOUR PROBLEM AND AN APPOINTMENT. 799-9985 weekdays 787-4828 weekends

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THE WILLIAM HODGES LAW FIRM
1338 MAIN AT WASHINGTON
Save this ad for future reference

The panel which heard the case found that respondent's advertisement was misleading, violating DR 2-101, Supreme Court Rule 32. The Panel Report recommended that the respondent be publicly reprimanded. Respondent filed Exceptions and Supporting Memorandum to the Panel Report.

The Executive Committee voted to adopt the panel's findings of fact and conclusions of law but voted (3-2) to modify the sanction to a private reprimand. Two members voted for no sanction to be imposed.

After considering the record and oral arguments in this matter, I do not believe respondent's advertisement violates DR 2-101. Respondent offered the testimony of the Standing Chapter XIII Trustee in the District of South Carolina, a United States Bankruptcy Judge from Georgia, and a professor of law from the University of South Carolina. They testified that based upon the total context of the ad, it was neither false nor misleading. Furthermore, respondent, a past Chairman of the Public Information Sub-Committee of the Public Affairs Committee of the South Carolina Bar, used the American Bar Association guidelines to design the advertisement. His advertisement contained a brief headline, a statement of the services offered, a disclaimer that an evaluation was required to determine whether or not persons

qualified for the services, and an inquiry clause listing his telephone number. It was geared to a lay audience in need of financial counseling and assistance. Of necessity, it had to be written in simple, direct layman's language if it was to be of any value to the consuming public.

The United States Supreme Court has offered the States guidance in the area of attorney advertising. In Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed. 2d 810 (1977) the Court first acknowledged an attorney's right to advertise. However, it held that false, deceptive or misleading advertisement of legal services could be restrained.

In Re R. M. J. 455 U.S. 191, 102 S.Ct. 929, 71 L. Ed. 2d 64 (1982), the Missouri Supreme Court had privately reprimanded an attorney for an advertisement he had published. The United States

Supreme Court reversed and held that attorney R. M. J.'s advertisement did not justify a sanction. The Court stated that the advertisement was not shown to be misleading nor did the State show a substantial interest promoted by restricting the advertisement. It concluded that although states may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further their substantial interests. I believe that today's majority opinion prohibiting appellant's advertisement does not meet these requirements.

Accordingly, I would dismiss the Complaint.

GREGORY, A.J., concurs.

THE BOARD OF COMMISSIONERS

ON

GRIEVANCES AND DISCIPLINE

IN THE MATTER OF]] WILLIAM W. HODGES,]] RESPONDENT.]]	CERTIFICATION OF THE RECORD BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE TO THE SOUTH CAROLINA SUPREME COURT

Pursuant to Section 14(A)(3) of the Rule on Disciplinary Procedure, the following is a Certification of the proceedings before the Commission in the captioned matter:

On or about December 9, 1981, the Respondent was served with a Notice and Complaint, the original of which is enclosed herein. Respondent filed an Answer on or about December 21, 1981, the original of which is enclosed. On or

about January 29, 1982, the Respondent filed copies of an Amended and Supplemental Answer, Motion to Strike, Motion to Make More Definite and Certain, and Motion to Serve Interrogatories, copies of which are enclosed. A hearing was held on these Motions on April 9, 1982. On or about April 20, 1982, the Respondent was served with a Notice and Amended Complaint, the original of which is enclosed herein. On or about April 28, 1982, the Respondent filed a copy of a Notice and Motion to Identify Complainant and supporting memorandum, copy of which is enclosed. On or about May 11, 1982, the Respondent filed a copy of a Second Amended and Supplemental Answer, a copy of which is enclosed. On or about May 14, 1982, the Respondent filed a Notice and Motion to Depose Expert Witnesses for Use at the Hearing(s) and Memorandum

in support thereof, a copy of which is included. On May 17, 1982, a letter was mailed to Respondent's Attorney informing him that the Complaint had been initiated by the Board in response to his newspaper ad, in Answer to his Motion to Identify Complainant, a copy of which is enclosed. At the direction of the Panel at its April 9, 1982 Motion hearing, the Complainant filed a pre-trial brief on May 17, 1982, the original of which is enclosed. The Respondent filed two pre-trial briefs, one not served on Complainant and one served on Complainant also on May 17, 1982, copies of which are enclosed. The Complainant filed a letter reply brief on or about May 25, 1982, the original of which is enclosed. A hearing was held on September 10, 1982, to hear the Notice and Motion to Depose Expert Witnesses for Use at Hearing(s). The

Respondent filed a Notice and Motion for Continuance on or about September 21, 1982, which Motion was denied by the Chairman of the Board of Commissioners on Grievances and Discipline, the original of which is enclosed. A Second Amended Complaint was requested by the Panel and served on the Respondent on September 23, 1982, the original of which is enclosed. The Respondent filed an Amended and Supplemental Answer to the Second Amended Complaint on September 25, 1982, the original of which is enclosed.

The matter came on for a panel hearing on September 23 and 24, 1982, in the Supreme Court Building before W. J. Fedder, serving as Chairman, Eugene C. Covington and James F. Walsh, Jr. The Complainant was represented by Assistant Attorney General C. Havird Jones, Jr. and the Respondent was represented by

Laughlin McDonald and Herbert Buhl, III.

The Panel Report, the original of which is enclosed, was filed on or about November 8, 1982, and served upon the Respondent on November 18, 1982. The Panel Report recommended that the Respondent be publicly reprimanded. Respondent was advised of his right to file exceptions and supporting briefs within the twenty days required by Section 14 of the revised Rule.

The Respondent filed Exceptions and Supporting Memorandum to the Panel Report on December 6, 1982. The Complainant did not file Exceptions to the Panel Report.

The matter came on for review by the Executive Committee on December 22, 1982. The Executive Committee, by a vote of 5 to 0, voted to adopt the panel's findings of fact and conclusions of law, but by a vote of 3 to 2, voted to modify

the sanction of the panel to a private reprimand. The two members against voted for no sanction to be imposed.

The original of the transcript of the panel hearing and the transcript of the Motion Hearing are enclosed.

The costs incurred by the Board in connection with this matter amount to $1250.45 ($1120.33 travel expenses and per diem for panel members, and $130.12 for witness fees).

A copy of this Certification is being sent to Attorneys for the Respondent and to the Attorney General.

s/
Donald V. Richardson
Chairman

Columbia, South Carolina
December 29, 1982

ATTESTED TO:

s/
Barbara W. Hinson
Administrative Assistant to the
Board of Commissioners on
Grievances and Discipline

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

BEFORE THE BOARD OF COMMISSIONERS

ON GRIEVANCES AND DISCIPLINE

In the matter of:

WILLIAM W. HODGES, Respondent

HEARING:

Held September 23, 1982;
Columbia, South Carolina

Hearing Panel:

W.J. Fedder, Chairman
Eugene C. Covington, Jr.
James F. Walsh, Jr.

Appearances for S.C.
Attorney General:

C. Havird Jones, Jr.
Assistant Attorney
General

Appearances for the
Respondent:

Laughlin McDonald
Herbert Buhl, III

PANEL REPORT
INTRODUCTION

The Respondent, William W. Hodges, was charged with misconduct by violating Disciplinary Rules 2-101(A)(1) (a, b, c, and f); 2-101(A)(2)(d and f); 2-101(B); 1-102(A)(4,5, and 6); and, Rule 5(B and D) of the South Carolina Supreme Court Rule on Disciplinary Procedure. The complaint is based upon a newspaper advertisement placed by the Respondent for his "get out of debt service" which consisted of a bankruptcy practice. The sole issues presented by the pleadings are whether the operation of the Rules of Disciplinary Procedure in this State violate the First Amendment made applicable to this State through the Fourteenth Amendment of the United States Constitution and whether the Sherman

Act, 15 U.S.C. §§ 1 and 2, forbids state regulation.

I. LAW

The United States Supreme Court has twice touched upon the issue of attorney advertising. There remain numerous questions to be resolved in drawing the line between the constitutional freedom of commercial speech and the state's interest to prevent dissemination of false or misleading information to the public as well as minimizing commercialization of the legal profession. Before considering the panoply of problems associated with defining the permissible parameters of attorney advertising, the existing constitutional guidelines must be historically and analytically outlined.

In Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748,

96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the United States Supreme Court held unconstitutional under the First and Fourteenth Amendments a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. Although recognized as the seminal decision concerning professional advertising, the Court expressly reserved consideration as to the regulation of commercial advertising by other types of professions:

> Although we express no opinion as to other professionals, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising. Id. at 773 n.25, 96 S.Ct., at 1831 (emphasis in original).

It was in the next term that the Supreme Court announced the decision which has been categorized by the American Bar Association Journal as the decision which lifted the total bar on lawyer advertising that has existed since 1908. Andrews, The Model Rules in Advertising, 68 American Bar Association Journal 808, (1982). What has been acclaimed as the case which opened the flood gates is in actuality a decision involving a very narrow issue concurred in by only five of the United States Supreme Court Justices.

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) involved only the question of whether lawyers may constitutionally advertise the prices at which certain routine services would be performed. Not at issue, and not decided in this

case, were the questions concerning advertising as to the quality of legal services or in-person solicitation. The majority initially concluded that attorney advertising of prices for routine services constituted constitutionally protected speech. Next considered were the justifications which constituted the foundation upon which the advertising ban was built: the adverse effect on professionalism, the inherently misleading nature of attorney advertising, the adverse effect on the administration of justice, the undesirable economic effects of advertising, the adverse effect of advertising on the quality of service, and the difficulties of enforcement.

The bedrock of the foundation, professionalism, has been traditionally feared to be threatened by commercialization which would undermine the

attorney's sense of dignity and self-worth. Also feared was the potential of tarnishment of the dignified public image of the profession as well as possible erosion of the client's trust in his attorney. However, the majority found the "postulated connection between advertising and the erosion of true professionalism to be severely strained." The Court noted that bankers and engineers advertise and their professions were not regarded as undignified. The Court reasoned that attorneys must ethically establish a clear agreement with his client as to a fee arrangement and that price advertising could only foster this goal.

It is interesting to note that the majority found that the ban on attorney advertising originated as a "rule of etiquette and not as a rule of ethics." Once the corner stone of tradition and

habit were eroded by the majority, the remaining justifications were easily chipped away.

The constitutional issue involved in Bates was whether the state could prevent the publication in a newspaper of a lawyer's truthful advertisement concerning the availability and terms of routine legal services. Even the majority emphasized that while attorney advertising may not be subjected to blanket suppression, the opinion should not be misconstrued that attorneys may not be regulated in any way. Advertising found to be false, deceptive, or misleading is necessarily subject to restraint. Advertising claims as to the quality of services, may be likely to be misleading because of the difficulty of measurement or verification. As with all varieties of speech, the majority also noted that there may be

reasonable restrictions on the time, place and manner of advertising.

The separate opinions authored by the remaining members of the Court expressed extreme reservations concerning the repercussions as well as the sagacity of the majority opinion. Justices Powell and Stewart did not agree that the First Amendment authorized unrestrained truthful newspaper advertising of a lawyer's prices for routine legal services. Virginia Pharmacy Board v. Virginia Consumer Council, supra, was distinguished. In Virginia Pharmacy Board the Court was careful to note the price advertising concerned a standardized product. As Justice Powell observed, legal services differ from tangible products in two ways: the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public

interest.

Mr. Chief Justice Burger agreed with the Powell dissent in that legal services can rarely, if ever, be standardized in the same manner as a product, and secondly that clients very seldomly appreciate in advance the type of services they in fact need. Chief Justice Burger further points to the potential problem of definition of routine legal services; a term the majority failed to identify or define.

Finally, Justice Rehnquist espoused the individual view that the First Amendment is only a sanctuary for expressions of public importance or intellectual interest. As such, commercial speech consisting of advertisements of goods or services would not be within the realm of protection of the First Amendment.

Proper reflection must be accorded

the base decision before analysis of the last pronouncement from the United States Supreme Court in this area. In January of this year the United States Supreme Court decided the case of In re R.M.J., ___ U.S. ___, 102 S.Ct. 929 (1982). In spite of the diverse opinions issued in Bates, In re R.M.J. was a unanimous decision. More significantly, the decision in In re R.M.J. was authored by Justice Powell who in Bates was the author of the strong dissent. For this reason, one should re-read the Powell dissent in Bates, particularly Section III where Justice Powell resigns himself to the majority decision concerning attorney advertising but emphasizes the majority's reservations to narrow the ultimate reach. The inherent peculiar problems associated with advertising the quality of legal services are highlighted in In re R.M.J.

Reasonable restrictions as to time, place and manner of commercial price advertising and the possibility of warnings or disclaimers to prevent misleading the consumer are also reiterated.

Justice Powell writing for the unified Court in In re R.M.J. again pointed out that Bates was a narrow decision. The Bates decision as interpreted by In re R.M.J. can best be recounted by Justice Powell's own summarization:

> "Commercial speech doctrine in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising relating to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggest that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain

types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S., at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonable necessary to prevent the deception.

Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. Central Hudson Gas Company v. Public Service Comm'n., 447 U.S., at 563-564. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest. Thus, in Bates, the Court found that the potentially adverse effect of advertising on professionalism and the quality of legal services was not sufficiently related to a substantial state interest to

justify so great an interference with speech." Id. at 50 L.W. 4188-4189.

In re R.M.J. involved a violation of Rule 4 of the Missouri Supreme Court regulating lawyer advertising. The attorney was charged with listing areas of his practice in language or terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and states in which he had been admitted to practice and mailing announcement cards to persons other than lawyers, clients, former clients, personal friends and relatives. There was no challenge to the constitutionality of the disclaimer requirement and the Supreme Court therefore intimated no opinion on this particular question.

The lawyer was reprimanded for deviating from the precise listings of areas of practice mandated by the Rule.

He apparently used the words "real estate" instead of "property" which the State did not contend was misleading to the public. Because the listings published by the lawyer were not shown to be misleading, and because the State established no substantial interest promoted by restricting advertising to precise listing, the Court concluded this portion of the Rule was an invalid restriction upon speech.

Likewise, the State failed to identify any substantial interest in a Rule which prohibits a lawyer from identifying jurisdictions in which he was licensed to practice and such information was found not to be misleading on its face. Of more concern, was the attorney's listing in large boldface type, that he was a member of the Bar of the Supreme Court of the United States. Justice

Powell wrote that the "emphasis of this relatively uninformative fact is at least bad taste." It was intimated that such a statement could be misleading to the general public who might be unfamiliar with requirements of admission to the Bar of United States Supreme Court. However, the State failed to establish anything in the record to indicate that the inclusion of this information was misleading.

The judgment of the Supreme Court of Missouri was reversed for the foregoing reasons. However, Justice Powell again emphasized in the opinion that "states retain the authority to regulate advertising that is inherently misleading or that has proven to be misleading in practice."

II. FINDINGS OF FACT

It is with the foregoing generaliza-

tions as to the principles and law concerning this area that we now turn to the circumstances of this particular case.

The Respondent placed an ad in a newspaper of general distribution in the Richland County area providing the following:

Our GET OUT OF DEBT Service

IF YOU ARE BEING HARASSED BY YOUR CREDITORS AND YOU NEED HELP TO GET OF DEBT:

STOP CREDITOR'S HARASSING CALLS
STOP FORECLOSURE OF HOME OR PROPERTY
STOP INTEREST/FINANCE CHARGES FROM BUILDING UP
IF YOU ARE EMPLOYED AND NEED HELP TO GET OUT OF DEBT, OUR LAW FIRM CAN HELP YOU BY ENROLLING YOU IN A WAGE EARNERS PLAN
CALL WILLIAM HODGES FOR AN EVALUATION OF YOUR PROBLEM AND AN APPOINTMENT.
799-9985-weekdays 787-4828-weekends

THE WILLIAM HODGES LAW FIRM
1338 MAIN AT WASHINGTON

Save this ad for future reference

The Respondent received his J.D. Degree from the University of South Carolina Law School in 1972 and has practiced law in South Carolina since 1973. Initially, the Respondent had a general practice and in 1980 bankruptcy began to dominate his practice. The Respondent has served as the Chairman of the Public Information Sub-Committee of the Public Affairs Committee of the South Carolina Bar in 1980. The Respondent began running the aforementioned ad in the summer of 1981 in the State Record, which is a newspaper published in Columbia, South Carolina. The ad was also published in the Florence and Orangeburg, areas. The Respondent testified that he prepared the ad inasmuch as he had some advertising background. The headline was designed to capture the attention of the reader. Although not specifically mentioned in

the ad, it is clear that the Respondent intended to advertise his bankruptcy practice. The Respondent, in fact, ran other ads for a short time which advertised only his name and that he practiced bankruptcy law. The Respondent admitted that the purpose of his ad was to bring people into his office who might need creditor relief and his clientele consisted primarily of low income clerical, blue collar, predominantly black, individuals with secured debts.

In light of the statistical information introduced into this record, this Panel must conclude as a matter of fact that the potential for deception or misunderstanding with our particular public is greater than in other parts of the country. South Carolina ranked last in the most recent scholastic aptitute (sic) tests scores. Approximately thirty (30%)

percent of the population of South Carolina has less than a ninth grade education. Locally, in the Richland and Lexington Counties, twenty (20%) percent of the population has less than a ninth grade education.

The testimony indicated that the typical profile of a South Carolinean who seeks bankruptcy relief consists of the following characteristics: below average education and skill, unemployed and generally black.

The issue of whether the Respondent's advertisement can be subject to different interpretations is a mixed question of law and fact. However, several observations concerning the Bankruptcy Reform Act of 1978 should be emphasized at this time. Initially, not everyone qualifies for relief under a wage earner's plan. Only an individual with regular income

that owes on the date of filing of the petition, noncontingent, liquidated, unsecured debts of less than One Hundred Thousand ($100,000.00) Dollars and non-contingent, liquidated, secured debts of less than Three Hundred Fifty Thousand ($350,000.00) Dollars, or an individual with regular income and such individual's spouse that owe noncontingent, liquidated, unsecured debts that aggregate less than One Hundred Thousand ($100,000.00) Dollars and noncontingent, liquidated, secured debts of less than Three Hundred Fifty Thousand ($350,000.00) Dollars may be a debtor under Chapter 13 of the Bankruptcy Reform Act. 11 U.S.C. §109(e). There are also restrictions concerning individuals who have previously been discharged in bankruptcy within six (6) years from the filing of a new petition. 11 U.S.C. §727. On the other hand, the

requirement of an individual with regular income does not necessarily mandate employment. Social Security and unemployment benefits may provide a regular source of income to qualify one for a wage-earner's plan. There is also testimony in this record which indicates that some jurisdictions will accept the reasonable anticipation of employment to qualify one for a wage-earner's plan.

The filing of a petition under the Bankruptcy Reform Act will act as an automatic stay of a foreclosure of a home or real property. 11 U.S.C. §362(a). However, a wage-earner's plan may not modify the terms or rights of a claim secured only by a security interest in real property that is the debtor's principle residence. 11 U.S.C. §1322(b)(2). Moreover, the stay of a foreclosure by a bankruptcy petition is not permanent.

A wage earner's plan for more than three (3) years may be approved by the Court upon the showing of good cause, however, the Court may not approve a period longer than five (5) years in any event. 11 U.S.C. §1322(c).

Certain debts are specifically excluded from the automatic stay provisions of a petition in bankruptcy. The collection of alimony, maintenance, or support from property that is not property of the estate will not be stayed by a petition in bankruptcy. 11 U.S.C. §362 (b)(2). Commencement or continuation of criminal actions or certain enforcements of government proceedings or judgments are likewise exempted from the stay provisions. 11 U.S.C. §362(b).

There is also testimony indicating that it is not common knowledge among the general public that the terms "wage-

earner's plan" and "bankruptcy" are synonymous. The testimony establishes that people have been misled when filing a wage-earner's plan in that they were unaware that the same constituted a bankruptcy proceeding which could effect credit references and for some individuals could have the possibility of unfavorable social connotation. Likewise, one could prevent creditors' harassing calls through the bankruptcy statutory scheme but affirmative action through contempt sanctions might be necessary to effectuate this goal.

As previously indicated, not all interest and finance charges are tolled by the filing of a wage-earner's plan. In addition to the specific exclusions for claims secured by the debtor's principle residence, creditors may be entitled to interest up to the value of

the stream of payments, and interest may continue to accrue on non-dischargeable debts. 11 U.S.C. §1325.

In fact, an unqualified assertion that a wage-earner's plan will get a person out of debt is also subject to differing interpretations. Even in the wage earner's plan, certain claims must be paid in full. 11 U.S.C. §§1322(a)(2), 507. Standing alone, the phrase "GET OUT OF DEBT" could support numerous inferences ranging from loans or refinancing agreements to consumer counseling or informal debtor-creditor arrangements. Moreover, it is highly unlikely that a member of the uninformed general public would glean that a "GET OUT OF DEBT" service through a wage-earner's plan would necessitate the supervision and control by a trustee in bankruptcy over all or a portion of the person's future earnings for a signi-

ficant amount of time. 11 U.S.C. §1322 (a)(1). Most significantly, the evidence in this case unequivacably established that there are cases where people do not completely get out of debt by filing a wage-earner's plan.

As one witness testified, it is not possible to explain the bankruptcy code in one hundred fifty (150) words or even two hundred fifty (250) words. However, this Panel and the State are not interested in requiring a complete dissertation of bankruptcy law including all the nuances of the statutory scheme. The State does have an interest in insuring that advertisements are not misleading as to results or methodology and that the public is accurately informed as to legal rights and remedies.

The advertisement in issue does not indicate the possibility of relief for

persons experiencing financial difficulties. The advertisement implies guaranteed and automatic results without exception or explanation. The promised panacea is indicated by mere enrollment in a wage-earner's plan without explanation that court proceedings are necessary and associated legal and judicial costs are taxed to the individual. The wage-earner's plan is indicated to be restricted to employed individuals when in actuality other types of individuals might also be qualified. Indefinite stays of foreclosure and interest and finance charges are promised when the act qualifies such relief both in time and category. Most significantly, the public is not informed that this "service" is a proceeding in bankruptcy and may not cure the total debts of the individual.

The Respondent's own expert witness

characterized this advertisement to be "fairly accurate", "substantially accurate" and "probably accurate". It was admitted that there are no absolutes in bankruptcy law as each case presents a peculiar problem and remedy. To advertise in terms of absolutes as compared to informational advertisements designed to disclose potential relief, the author necessarily insures and warrants the results and quality of his service.

The Respondent asserts that the inquiry clause wherein he advises the reader to call him for an evaluation of his problem and an appointment cures the necessity for a disclaimer. However, this Panel does not agree with the Respondent's interpretation of Bates or In re R.M.J. The Respondent's argument necessarily assumes that if people are misinformed or confused regarding the

advertisement that the evaluation of their problem by the inquiry clause will cure any confusion. The argument fails to consider the possibility of individuals in the public failing to obtain an explanation and therefore laboring under misconceptions as well as the severe problems of policing the attorney to insure that the evaluation has adequately informed the client as to the actual remedies and rights. Moreover, the State has an interest in insuring that in the first instance the public is not misled or misinformed.

The Disciplinary Rules promulgated by the Supreme Court of this State do not create a blanket ban of all attorney advertising. DR2-101 of Rule 32 of the Rules of the Supreme Court of South Carolina, as amended, provides as follows:

"(A)A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(1) Without limitation a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim includes a statement which:

(a) Contains a material misrepresentation of fact;

(b) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(c) Is intended or is likely to create an unjustified expectation;

(d) States or implies that a lawyer is a certified or recognized specialist other than as permitted by DR2-105;

(e) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(f) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive,

(g) Contains an offer to provide a service which is illegal.
(2) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:
(a) Is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
(b) Contains statistical data or other information based on past performance or prediction of future success;
(c) Contains a testimonial about or endorsement of a lawyer;
(d) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verificatin by the public;
(e) Appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion; or
(f) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles, or garish or sensational language or format.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish, subject to DR2-103, the following information in print media distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication complies with DR2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR2-105;

(3) Date and place of birth;

(4) Date and place of admission to the Bar of State and Federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Legal teaching positions;

(7) Memberships, offices and

committee assignments in Bar associtaions;
(8) Technical and professional licenses;
(9) Foreign language ability;
(10) Names and addresses of bank references;
(11) With their written consent, names of clients regularly represented;
(12) Prepaid or group legal services programs in which the lawyer participates;
(13) Whether credit cards or other credit arrangements are accepted;
(14) Office and telephone answering service hours;
(15) Fee for an intial consultation;
(16) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(17) Contingent fee rates subject to DR2-106, provided that the statement discloses whether percentages are computed before or after deduction of costs;
(18) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(19) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged;

(20) Fixed fees for specific legal services, the description of which could not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged.

(C) If a lawyer publishes any fee information in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information in a publication

> which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.* * *"

A person desiring to expand upon the information authorized for disclosure in this Rule may apply to the Supreme Court of South Carolina for the express purpose of a determination as to whether or not the proposal "accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services." DR2-101(E), Rule 32, Rules of the Supreme Court of South Carolina, as amended. The record in this case fails to establish that the Respondent ever petitioned the Supreme Court for permission to expand upon the information allowed by our

Disciplinary Rules in spite of the fact that the Respondent served as Chairman of the Public Information Sub-Committee of the Public Affairs Committee of the South Carolina Bar in 1980 which considered the particular problems of attorney advertising.

III. CONCLUSIONS OF LAW AND RECOMMENDATION

The entire Court in Bates v. State Bar of Arizona, supra, agreed that the Sherman Act was not intended to apply to the state's activity in regulating lawyers under the Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed 315 (1943), exception. The Panel therefore holds as a matter of law that the Respondent's Sherman Act defense is without merit.

In Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980), the United States Supreme Court announced

a four-part analysis in commercial speech cases. Initially there must be a determination as to whether the expression is protected by the First Amendment. In order to deserve First Amendment protection, the commercial speech must concern lawful activity and must not be misleading. Next, the asserted governmental interest must be established to be substantial. If both of these inquiries are answered affirmatively, the next step is to determine whether the regulation directly advances the governmental interest asserted and finally whether the regulation is more extensive than necessary to serve that interest.

The United States Supreme Court has recognized that the Central Hudson formula "must be applied to advertising for professional services with the understanding that the special

characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public." In re R.M.J., supra, 50 L.W. at 4189, n.15. The Supreme Court has also acknowledged that the generalizations do not afford precise guidance to the Bar and courts and at best only offer general principles that will be further developed on a case by case basis. Id., at n. 16.

Our State Supreme Court has attempted to follow this precedent by incorporating a rule which indicates the general principles enunciated by the United States Supreme Court and then attempts to identify specific information which would comply with these principles. The rule then affords the individual attorney the opportunity to expand upon the disclosable information by petition

to the Supreme Court for a determination of the reliability and truthfulness of additional information in the spirit of informed selection of counsel. This approach is certainly preferable to a rigid guideline of permissible information or a general rule of principle without specification as to allowable categories of information which may be disseminated. While the Panel is convinced that the Disciplinary Rules concerning advertising in this State meet the constitutional requirements of the Central Hudson formula, it is not necessary in this particular case to establish the State interest or the issue of whether or not the rules advance the governmental interest and are more extensive than necessary to serve that interest because of the misleading nature of the advertisement.

Misleading commercial speech is not entitled to protection under the auspices of the First Amendment and is subject to restriction. Bates v. State Bar of Arizona, supra; Central Hudson Gas v. Public Service Commission, supra; In re R.M.J., supra. This advertisement in the opinion of the Panel omits to state material facts necessary to make the statements, in light of all circumstances, not misleading. It is also likely to create unjustified expectations as to the ultimate results of a wage-earner's plan. It fails to contain reasonable warnings or disclaimers necessary to make the representation not deceptive to an ordinary prudent person. By guaranteeing results, the advertisements contains a representation or implication regarding the quality of legal service which is not susceptible of reasonable verification

by the public. It further fails to identify the field of law in which the lawyer practices or is advertising to the public.

This Panel concludes that there is sufficient evidence in this record to establish that the Respondent's particular advertisement is misleading in practice. The Panel further finds that the Respondent's advertisement is inherently false and misleading. Hence, it is the conclusion of this Panel that the Respondent's advertisement is not entitled to First Amendment protection and may be prohibited by the State. It is further the conclusion of this Panel that the Respondent's advertisement contravenes the Disciplinary Rules promulgated by the South Carolina Supreme Court.

The Panel is congnizant of the United States Supreme Court's admonition that certain types of potentially mis-

leading information such as listing areas of practice, may not be absolutely prohibited if the information may also be presented in a way that is not deceptive. The Rules of the South Carolina Supreme Court concerning advertising provide for dissemination of such information in a non-deceptive manner. There is no prohibition upon the Respondent's right to advertise that he practices in the area of bankruptcy or that he can provide wage-earner's plans for potential clients through the bankruptcy law. There is also a procedure whereby the Respondent could have petitioned the South Carolina Supreme Court for permission to publish the availability of truthful and accurate potential relief with proper warnings or disclaimers which would have cured the misleading nature of the advertisement. Considering the legitimate State interest

of enforcement problems and protection of the unsophisticated public concerning misstatements of legal rights and remedies, the procedure for obtaining permission to advertise information other than that authorized by the rules of this State is not overburdensome and does not chill the constitutional freedom of commercial speech. Lawyers, after all, are inherently familiar with the judicial process and should be able to comply with the Disciplinary Rules with minimal time and effort.

As emphasized by Justice Powell in his separate opinion in Bates v. State Bar of Arizona, even the advertisement of lawyers' prices for routine legal services can be misleading because neither the quantitative nor qualitative measurement of the service actually needed is likely to be known in advance. A

potential client obtaining information by an advertisement that an uncontested divorce can be secured for a specified amount "can be grievously misled if he reads the advertised service as embracing all of his possible needs." Id., 97 S.Ct. at 2714. In the instance case, the advertisement indicates that the client will obtain an absolute cure of all his financial difficulties through a wage-earner's plan. This assumption is obviously misleading and merely magnifies the associated problems when one attempts to advertise truthfully and completely outside the area of prices for routine legal services.

This Panel, as perhaps the majority of the Bar, is personally convinced that attorney advertising still constitutes improper etiquette. Hence, it is the natural reaction of an attorney or

tribunal who has been raised under traditional notions of professionalism, to view commercial legal speech with disapprobation. Yet, the realization that a total ban of legal commercial speech constitutes nothing less than censorship renders the idea of attorney advertising more palatable to even the staunchest traditional (sic). Hence it is with Voltairian[1] spirit that we approach this issue.

In making its recommendation of discipline in this case, the Panel is accutely aware of the Respondent's prior position in a sub-committee of the Bar which dealt specifically with advertising matters. As an attorney, the Respondent is charged with notice and knowledge of the Disciplinary Rules as well as the

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[1] "I disapprove of what you say, but I will defend to the death your right to say it." Attributed to Voltaire (1694-1778) in S.G. Tallentyre, The Friends of Voltaire, Page 199 (1907).

availability of judicial machinery to authorize publication of additional information not specifically provided for in the Rules of Discipline. It was only after the institution of these proceedings that the Respondent petitioned the Court for permission to publish this particular ad. The Panel further finds significant that the Respondent designed the ad calculating to appeal to unsophisticated and uneducated members of the public who were more susceptible to misconceptions due to their lack of sophistication concerning the relatively new bankruptcy law. It is equally significant that after institution of these proceedings, the Respondent voluntarily discontinued running this particular advertisement. In view of these considerations, it is the unanimous recommendation of this Panel that the

Respondent, William W. Hodges, be publicly reprimanded.

Respectfully submitted,

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

s/
W. Jerry Fedder, Panel Chairman

s/
Eugene C. Covington, Jr.

s/
James F. Walsh, Jr.

28th day of October, 1982